Wee Tiang Peck v Teoh Poh Tin

HIGH COURT (KOTA BHARU) — ORIGINATING SUMMONS NO 32–5–88
IDRIS YUSOFF J
4 SEPTEMBER 1994

Land Law *— Malay reservations — Power of attorney — No approval obtained from Ruler-in-Council — Non-Malay owner — Whether power of attorney given contrary to law and void ab initio — Malay Reservations Enactment 1930 ss 7(i) & 13A*

Land Law *— Malay reservations — Dealings in reservation land — Giving of power of attorney — Whether property vested indefeasibly in donee — Malay Reservations Enactment 1930 s 7(i) — Powers of Attorney Act 1949 s 5*

Words and Phrases *— 'Vest' — Malay Reservations Enactment 1930 s 7(i)*

Prior to the filing of a divorce petition, both parties to this action agreed that the applicant was to execute a power of attorney in favour of the respondent covering, inter alia, a piece of land ('the land') which was gazetted as Malay reserve land on 1 January 1931. The applicant applied for an order that the irrevocable power of attorney which he had executed was null and void ab initio for contravening the provisions of s 7(i) of the Malay Reservations Enactment 1930 ('the Enactment'). The land had initially been transferred to the applicant's father on 15 May 1933 and subsequently to the applicant on 15 May 1967. The issue for the court to decide was whether upon the true construction of the power of attorney and the relevant provisions of the Enactment, the power of attorney given without the prior approval of the Ruler-in-Council contravened s 7(i) of the Enactment which places certain restrictions on dealings in, inter alia, rights and interests in reservation land acquired by virtue of s 13A by any person not being a Malay.

Held, dismissing the application:

(1) To succeed in his application, the applicant must prove that the right and interest in the land was acquired by his father through or with the aid of s 13A of the Enactment. In this case, the acquisition of the land by the applicant's father on 15 May 1933 from the original Malay owner was not a direct transfer as envisaged in s 13A but was by an indirect manner through excising the land from the Malay reservation before the transfer. The restriction imposed by s 7(i) was therefore not applicable.

(2) The giving of the power of attorney by the applicant did encompass 'rights and interests' in the land since it touched upon the right, power or privilege of the applicant over or in connection with the land.

(3) 'Vest' as it appears in s 7(i) of the Enactment is intended to cover cases where the right or interest is indefeasibly vested in a person so as to form part of his property.

(4) The effect of s 5 of the Powers of Attorney Act 1949 is that the vesting of the property in the respondent pursuant to the irrevocable power of attorney did not signify that the applicant had divested himself of the title to his property and transferred the same to the respondent. As such, this case fell outside the ambit of s 7(i) of the Enactment.

[Bahasa Malaysia summary

Sebelum memfailkan petisyen perceraian, kedua-dua pihak di dalam tindakan ini telah bersetuju bahawa pemohon akan melaksanakan satu surat kuasa wakil yang memihak kepada penentang yang merangkumi, antara lainnya, sebidang tanah ('tanah itu') yang telah diwartakan sebagai tanah rizab Melayu pada 1 Januari 1931. Pemohon telah memohon untuk satu perintah bahawa surat kuasa wakil tidak boleh batal yang telah dilaksanakan olehnya adalah terbatal dan tidak sah dari mula lagi kerana ia melanggar peruntukan s 7(i) Enakmen Rizab Melayu 1930 ('Enakmen itu'). Tanah itu mulanya telah dipindahmilik kepada bapa pemohon pada 15 Mei 1933 dan kemudiannya kepada pemohon pada 15 Mei 1967. Isu untuk diputuskan oleh mahkamah ialah sama ada mengikut tafsiran sebenar surat kuasa wakil itu dan peruntukan relevan Enakmen itu, surat kuasa wakil itu yang telah diberikan tanpa kebenaran terlebih dahulu dari Raja dalam Mesyuarat melanggar s 7(i) Enakmen itu. Seksyen itu meletakkan beberapa sekatan tertentu ke atas urusan-urusan berkenaan dengan, antara lainnya, hak dan kepentingan di dalam tanah rizab yang diperolehi melalui s 13A oleh seseorang bukan Melayu.

Diputuskan, menolak permohonan itu:

(1) Untuk berjaya di dalam permohonannya, pemohon mesti membuktikan bahawa hak dan kepentingan di dalam tanah itu telah diperolehi oleh bapanya melalui atau dengan bantuan s 13A Enakmen itu. Di dalam kes ini, perolehan tanah itu oleh bapa pemohon pada 15 Mei 1933 daripada tuanpunya Melayu asal bukanlah melalui satu pindahmilik terus seperti yang dibayangkan di dalam s 13A tetapi dengan cara tidak langsung secara mengeksisi tanah tersebut daripada tanah rizab Melayu sebelum pindahmilik itu. Oleh itu, sekatan yang diletakkan oleh s 7(i) tidak terpakai di dalam kes ini.

(2) Pemberian surat kuasa wakil oleh pemohon merangkumi 'hak dan kepentingan' di dalam tanah itu memandangkan yang ia menyentuh hak, kuasa atau hak istimewa pemohon ke atas atau berkenaan dengan tanah itu.

(3) 'Letakhak' seperti yang terdapat di dalam s 7(i) Enakmen itu bertujuan meliputi kes-kes di mana hak atau kepentingan diletakhak secara tidak boleh disangkal pada seseorang supaya membentuk sebahagian daripada hartanya. A

(4) Kesan s 5 Akta Surat Kuasa Wakil 1949 adalah bahawa perletakhakan tanah itu pada responden menerusi surat kuasa wakil tidak boleh batal itu tidak menandakan bahawa pemohon telah melepaskan haknya kepada hakmilik tanah itu dan memindahkannya kepada penentang. Oleh kerana itu, kes ini terkeluar daripada lingkungan s 7(i) Enakmen itu.] B

C

Notes

For cases on the giving of powers of attorney in respect of Malay reservation land, see 8 *Mallal's Digest* (4th Ed) paras 1540–1542.

For cases on the construction of the word 'vest', see *Malayan Law Journal Words and Phrases Judicially Defined* [1990] at p 594.

D

Cases referred to

Idris bin Hj Mohamed Amin v Ng Ah Siew [1935] MLJ 257; [1935] FMSLR 257 (distd)

Richardson v Robertson (1862) 6 LP 75 (refd)

Tan Hong Chit v Lim Kin Wan [1964] MLJ 113 (distd) E

Legislation referred to

Bankruptcy Act 1967 s 24(4)

Interpretation Acts 1948 and 1967

Kelantan Malay Reservations Enactment No 18 of 1930 ss 7(i), 8, 13A F

Kelantan Malay Reservations Enactment No 19 of 1933

Kelantan Malay Reservations Enactment No 8 of 1940

Kelantan Malay Reservations Enactment No 3 of 1949

Land Acquisition Act 1960 s 66

Malay Reservations Enactment 1913 s 8(i) G

Powers of Attorney Act 1949 s 5

Lua Kok Hiyong (*Lua & Mansor*) for the applicant.

Teo Poh Oon (*Teo & Chew*) for the respondent.

H

Idris Yusoff J: The applicant married the respondent some time in 1968, but unfortunately some years later, they encountered a number of matrimonial problems which led to both of them living apart. Attempts at reconciliation were made but proved futile. They, therefore, decided to petition for divorce.

As a prelude to filing the divorce petition, both parties agreed that I the applicant was to execute a power of attorney in favour of the respondent covering two properties described below:

A (a) PT 413 section 19 Bandar Kota Bharu held under HS(D) KB121/71 together with a double storey house erected thereon; and

(b) ⅓ undivided share in Lot 934 Mukim Bukit Merbau, Jajahan Pasir Puteh, Kelantan held under Grant 15346.

B The said power of attorney was prepared by a solicitor on the instructions of the respondent; and on or about 2 February 1986, the applicant, as requested, went to the office of Messrs HS Lim, Teo & Partners, advocates and solicitors, 1st floor D & C Building, Jalan Gajah Mati, Kota Bharu where he executed the said power of attorney. The said power of attorney was registered at the High Court, Kota Bharu and was expressed to be C irrevocable, much to the chagrin of the applicant, as was later borne out when he contended that the provisions for the irrevocability of the power of attorney and regarding the consequences thereof were never explained to him. He claimed that when he executed the power of attorney, he believed that it would reflect all the points that had hereinbefore been agreed to between both parties. On realizing the contrary, he came to this D court on a notice of motion for the orders that 'the said power of attorney be declared null and void ab initio and of no effect, and accordingly any dealings or transactions transacted by the respondent of the said power of attorney be declared null and void; that the senior assistant registrar or the relevant officer of the High Court, Kota Bharu do cause the registration of E the said power of attorney be revoked or cancelled with immediate effect' and consequently, that a private caveat entered by the respondent on the said two properties on 16 April 1986 be removed.

However, after considering the affidavits in reply filed by and on behalf of the respondent, the applicant decided to retract the issue of F irrevocability and instead proceeded on the premise that the power of attorney, having contravened the provisions of s 7(i) of the Kelantan Malay Reservations Enactment No 18 of 1930 ('the Enactment') was null and void ab initio. As set out above, one of the orders initially sought for was to impugn the validity of the power of attorney covering both properties, but in the course of hearing, the applicant, for some unexplained reasons G decided to abandon his challenge in respect of Lot PT 413 section 19 Bandar Kota Bharu — thereby leaving the court with the task of ascertaining the validity pertaining only to the ⅓ undivided share in Lot 934, Mukim Bukit Merbau, Jajahan Pasir Puteh (hereinafter referred to as 'the said land').

H On referring to relevant documents, the following facts are not disputed:

Date	Facts
27 October 1920	Grant No 15364 Bukit Merbau Pasir Puteh was registered in the name of one Nik Mohamed
I	Salleh bin Nik Omar.
1 January 1931	The said land was gazetted as Malay reserve land pursuant to Grant No 57–30.

15 May 1933	The said land was transferred to Wee Hian Thim (⅓), Wee Song Thiet (⅓) and Wee Song Tam (⅓).
15 May 1967	Wee Hian Thim transferred his ⅓ undivided share to the applicant.
17 June 1967	Wee Song Tam transferred to Wee Tiang Hong his ⅓ undivided share
17 December 1968	The applicant and respondent registered their marriage.
1 March 1972	Wee Song Tam transferred to Wee Tiang Kim @ Wee Tian Keng his ⅓ undivided share.
2 February 1986	Wee Tiang Peck (the applicant) gave a power of attorney to Teoh Poh Tin (the respondent) without obtaining the approval of the Ruler-in-Council.

Hence, the issue to be decided by the court can appropriately be formulated as follows: whether upon the true construction of the said power of attorney and the relevant provisions of the Enactment, the said power of attorney given without the prior approval of the Ruler-in-Council contravenes s 7(i) of the Enactment.

For ease of reference, set out below is an extract of s 7(i) of the Enactment:

> No right or interest of any Malay in reservation land and no right or interest in such land acquired by virtue of section 13A by any person not being a Malay shall be transferred to or transmitted to or vest in any person not being a Malay provided that leases of reservation land shall be valid to the extent specified in sub-sections (ii) to (v) below, save as provided in this Enactment.

Perhaps it might be of some interest to refer also to s 8 of the Enactment which deals specifically with the creation of a power of attorney with respect to Malay reservation land:

> No person not being a Malay shall by virtue of any Power of Attorney registered after the commencement of this Enactment and granted to him by a Malay be entitled to sell, charge, lease or otherwise deal with or to occupy or manage or to authorise any other person to sell, charge, lease or otherwise deal with or occupy or manage any reservation land or interest therein belonging to such Malay and any such Power of Attorney shall in so far as such reservation land is concerned be absolutely null and void.

As can be seen, s 7(i) imposes certain restrictions when dealing with the rights and interests of lands within the Malay reservation, namely:

(i) right or interest of a Malay in reservation land; and

(ii) right or interest in reservation land acquired by virtue of s 13A by any person not being a Malay.

A For our present purpose, (i) has no relevance as at the material time, no Malay right or interest was involved — it is only with respect to dealings categorized in (ii) which call for judicial interpretation.

The undisputed facts show that the said land was registered in the name of a non-Malay at the time when the power of attorney was created, B and in my view, for the applicant to succeed in his application, it is incumbent upon him to primarily prove that the right and interest of the said land was acquired by his father through or with the aid of s 13A, but unfortunately, the evidence in this respect is very much lacking.

It is true that the said land was acquired by his father from the original Malay owner after the said land was declared a Malay reservation. C Could it then be said that the acquisition was made through the instrumentality of s 13A? Perhaps a little reference to the historical background of the Enactment might be able to bring about some enlightenment on the objects of the Enactment. It would be observed that s 13A was not in the original text. The first s 13A was added to the D Enactment by the Kelantan Malay Reservations Enactment No 19/1933 which came into force on 5 December 1933 and it was couched in the following terms:

> (i) Notwithstanding any provision of this Enactment it shall be lawful for His Highness the Sultan in Council to give sanction for the transfer of any reservation land to any person professing the Mohammedan religion E but not being a Malay and such transfer may be registered if presented with a certificate signed by the State Secretary in the form of Schedule C.
>
> Upon registration of the transfer of the land such certificate shall be attached to the document of transfer.
>
> (ii) Upon registration of such transfer the land affected thereby shall remain F subject to all the provisions of this Enactment save only that such land shall be transferable to the descendants of the transferee in accordance with Mohammedan Law.
>
> (iii) The following Schedule is added to the principal Enactment: ...

G Section 13A was then repealed and a new s 13A was substituted by Kelantan Malay Reservations Enactment No 8/1940 which came into force on 2 April 1940 and at the same time, the words 'save as provided in this Enactment', ie in the substituted s 13A, were added to ss 6 and 7(i). The substituted s 13A was worded as follows:

> H (i) His Highness the Sultan in Council may approve the alienation, transfer or transmission of any reservation land to any person not being a Malay; and the Approved Application, Memorandum of Transfer or Application for Registration, as the case may be, under the Land Enactment, may be registered if presented with a certificate signed by the State Secretary in the form of Schedule C. Upon registration such I certificate shall be attached to the Approved Application, Memorandum of Transfer or Application for Registration, as the case may be.
>
> (ii) Upon registration of such Approved Application, memorandum of Transfer or Application for Registration, as the case may be, the land

> affected thereby shall remain subject to all the provisions of the Malay Reservations Enactment.

It would appear that the objects of this amendment were to make clear what was understood to be the true objects of the Enactment, namely, to reserve the general use of land within the area declared as reservation land for Malays, and within that area to render a procedure more flexible in order to enable particular areas to be alienated, transferred or transmitted to persons other than Malays without excising such particular area from the reservation. In 1949, there was a further amendment to s 13A through Kelantan Malay Reservations Enactment No 3 of 1949 — which amendment sets out the present provisions.

It would, therefore, be clear that the acquisition of the said land by the applicant's father on 15 May 1933 from the original Malay owner was done by way of indirect or circuitous manner, ie by first excising the said land from the Malay reservation before it was transferred to him, the first non-Malay buyer and not by the direct transfer as envisaged in s 13A.

Counsel for the applicant urges the court to accept the fact that the said land was acquired by virtue of s 13A by a person not being a Malay as the said land was transmitted to the applicant on 15 May 1967 upon the death of his father, Wee Hian Thin; the latter having acquired it after the declaration of the Malay reservation. In support of his argument, counsel refers to the judgment of Suffian J in *Tan Hong Chit v Lim Kin Wan* [1964] MLJ 113, in particular to p 115 col 2F–G, wherein his Lordship said:

> If the lands here had been *state lands* within a reservation and they had been alienated by the Ruler-in-Council to the appellant or first to a non-Malay and subsequently transferred or transmitted to the appellant, she would have acquired them under s 13A; likewise if she had them transferred or transmitted to her by a previous Malay proprietor with the approval of the Ruler-in-Council. (Emphasis added.)

With respect, I do not share counsel's view in this respect, as the passage is quoted out of context. What his Lordship said in that case was that there were three types of land within the Malay reservation, namely:

(a) state land;

(b) land of which a Malay is the registered proprietor; and

(c) land of which a non-Malay is the registered proprietor.

And in respect of lands falling under (c), his Lordship explained the existence of two kinds of rights and interests, ie:

(i) rights and interests acquired under s 13A; and

(ii) rights and interests acquired otherwise.

In *Tan Hong Chit*'s case, the lands in question were owned by non-Malays prior to the declaration of Malay reservation and his Lordship went on to illustrate what would be the position had the lands in question been state lands and the acquisition by the appellant in circumstances therein described could be said to have been under s 13A. In other words, his Lordship

explained what constituted 'acquisition under s 13A' in so far as state lands were concerned, a situation entirely different from the issue presently before the court where the said land is an alienated land.

In the circumstances, and relying on the available facts, I hold that the acquisition of the said land from the Malay owner in 1933 was not and could not be 'by virtue of s 13A' as stipulated in s 7(i) of the Enactment and on this ground alone, it is sufficient for the court to dismiss the applicant's application.

Lest I go wrong in my interpretation, I still think, however, that the creation of the power of attorney in the circumstances does not offend the purport and intent of s 7(i). As can be observed, s 8 has no application to the matter before me since it does not involve any Malay land or interest. Be that as it may, counsel for the applicant contends that the granting of the power of attorney by the applicant to the respondent is tantamount to 'a transfer to' or 'a vesting in' the respondent of the rights and interests of the applicant in the said land.

Counsel goes on to discuss at length the interpretation that should be given to the words 'rights or interests' and 'vesting' appearing in s 7(i). Failing to find any legal definition of the words 'power of attorney' in the Powers of Attorney Act 1949 and the Interpretation Acts of 1948 and 1967, counsel turns to *Jowitt's Dictionary of English Law* (2nd Ed) and the *Oxford Concise English Dictionary* (6th Ed). Counsel stresses that according to the dictionary, the word 'power' is sometimes used in the same sense as 'right' and such power is either general or limited. In the case of a general power, it:

> ... enables the donee to create or modify estates or interests in property [and] confer[s] the right of alienation as opposed to that of enjoyment; that is, the power enables the donee to declare in whom and in what manner the property is to vest, but gives him (qua donee) no right of ownership over it. Such a power is said to be legal when it operates upon or passes the legal estate in the property, and equitable when it only operates on or passes a beneficial or equitable interest.

In the instant case, counsel argues that based on the above definition and in particular relying on the case of *Idris bin Hj Mohamed Amin v Ng Ah Siew* [1935] MLJ 257; [1935] FMSLR 257, the creation of the power of attorney by the applicant, having regard to the general nature of the power, was tantamount to vesting in the respondent the rights and interests of the said land and consequently, in the absence of approval of the Ruler-in-Council, the power of attorney was void ab initio.

It will be seen that in the *Idris* case, the appellate court expressed what would constitute 'rights or interests' as contemplated in s 8(i) of the Malay Reservations Enactment 1913 which is, in part, equivalent to the present s 7(i) of the Enactment. Considering the facts and circumstances therein, the court was of the view that the combined effect of the power of attorney and the agreement executed by the appellant in favour of the respondent would be the same as giving away all rights and interests in the lands to the respondent except for the nominal ownership. And,

consequently, the court held that since the power of attorney did relate to a right or interest in reservation land, it would be revocable under s 8(ii) of the Enactment.

Based on the reasons set out in the judgment of the *Idris* case, I find myself drawn to the construction as canvassed by counsel for the applicant that in the instant case, the issue encompasses 'rights and interests' in the said land since it touches upon the right, power or privilege of the applicant over or in connection with the said land.

What is next to be considered is whether there is a vesting of the rights and interests of the said land in the donee of the power (the respondent), that the effect of the power of attorney given to her can be said to bear out the same consequences as in the *Idris* case.

A 'power of attorney' is defined as a formal instrument by which one person empowers another to represent him or act in his stead for certain purposes, see *Jowitt's Dictionary of English Law* (2nd Ed). Such instrument must be strictly construed according to well recognized rules. Once a power of attorney is created, the relationship of principal and agent arises between the donor and the donee of the power. In no case could the authority of the donee exceed the power of the donor to act on his own behalf. In all cases, the donee of the power owes the donor duties of a fiduciary character, eg to keep accounts of all transactions that transpired and must also be prepared to produce them to the donor at all times, to disclose any conflict of interest and not to receive any secret commission or bribe — see 1(2) *Halsbury's Laws of England* (4th Ed) at para 87. If a person is acting under the power of attorney, he should as a general rule, act in the name of the donor of the power and likewise if he is authorized to sue on the donor's behalf, the action should be brought in the donor's name.

In the *Idris* case, the power of attorney conferred on the respondent the following powers:

(a) to enter into possession of the rents and profits;

(b) to sell and dispose of all or any part of the lands together with the houses or buildings thereon either by private contract or by public auction;

(c) to give a good receipt for the purchase price or the rent;

(d) to lease or otherwise dispose of the lands within the limits allowed by the Enactment;

(e) to retain as his absolute property any sums received by him on the sale of or from the rents and profits of the lands in excess of RM20,100 without any liability to account; and

(f) on the death of the appellant to apply for letters of administration to the property in question.

Further in the agreement, 'the appellant agreed that his right to revoke the power of attorney should be conditional on his paying to the respondent the sum of RM20,100 due under the charges, and that all coconuts

A plucked by the respondent should be accepted by him in satisfaction of interest and for payment of annual quit rent, water rates and other charges for clearing the land without any liability to account'.

Huggard CJ (SS) in his judgment said at p 260:

> It is true, of course, that some of the rights conferred do not necessarily, if taken by themselves, create an interest in land, but in my opinion, in a case of this kind, one must look at the transaction as a whole. And when one considers the power of attorney and agreement in conjunction with the charges, it seems clear that the intention of the parties was that the appellant should *transfer* to the respondent everything but the actual ownership of the lands in question. (Emphasis added.)

A look at the power of attorney in the instant case shows that it contains the powers as generally conferred on the donee; there is no provision conferring on the donee the right to retain as his absolute property any sum received by him on the sale, charge or any other dealings pertaining to the said land. In other words, the donee is not exempted from any liability to acount in respect of any sum of money received by him, a significant difference from the *Idris* case.

Turning to the word 'vesting', counsel for the applicant refers to *Osborn's Concise Law Dictionary* (8th Ed) wherein it means 'to clothe with legal rights' and on the facts, counsel submits that the applicant was vested with the right and interest of the said land upon the registration of the power of attorney.

The word 'vest' as said by Lord Cranworth in *Richardson v Robertson* (1862) 6 LP 75, 'is a word at least of ambiguous import ...'. And a reference to a number of cases shows that the word has not been given a fixed connotation. It may sometimes mean:

(i) full ownership, ie when a land is vested in a person the whole estate and interest go to him. A good example can be found in s 66 of the Land Acquisition Act 1960 which says: 'Upon the making of a memorial under section 23 in respect of any scheduled land, the land shall vest in the State Authority as State land free from incumbrances...'; or

(ii) only possession for a particular purpose. This can be gathered from the Bankruptcy Act 1967 where in s 24(4) it states: 'When a debtor is adjudged bankrupt his property shall become divisible among his creditors and shall vest in the Official Assignee'. The vesting of the bankrupt's property in the Official Assignee is to enable the latter to administer the former's estate, purely for the purpose of settling the bankrupt's debt after realizing his assets and not for all purposes; or

(iii) clothing a person with the power to deal with the property of another person as in the case of the power of attorney.

Considering the intention for the promulgation of the Enactment which is, in the main, to preclude Malays from parting with their rights and interests in reservation lands and also looking at the other stringent provisions thereof, I am inclined to hold that 'vesting', as appears in s 7(i), is intended

to cover cases where the right or interest is indefeasibly vested in a person to form part of his property, thereby enabling him to deal with and alienate such right and interest as his own, similar to those cases coming within the ambit of meaning (i) in the preceding paragraph.

A land 'vested' in the donee under a power of attorney which is expressed to be irrevocable will continue to so vest until notice of renunciation in writing by the donee is deposited in every office in which the office copy of the power of attorney or the true copy thereof has been so deposited or either the donor or donee has died or the donee has become of unsound mind — see s 5 of the Powers of Attorney Act 1949. In such event, the vesting of the property in the donee does not signify that the donor has divested himself of the title to his property and transferred the same to the donee. He can still exercise his rights with the consent of the donee to convey such property to other person and as a corollary upon the death or the unsoundness of mind of the donee, the property will revert to the donor.

Viewing the application as a whole, it is my judgment that on the facts and the law, the creation of the power of attorney by the applicant in favour of the respondent does not in any way infringe upon the provisions of s 7(i) of the Enactment and the said power of attorney is therefore valid. The motion is dismissed with costs.

Application dismissed.

Reported by Kevin Ooi